Supreme Court, U.S.
FILED

No. (1) 10-595 NOV 2 - 2010

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IN THE

Supreme Court of the United States

FRANCIS A. ZARRO, JR.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a criminal defendant involuntarily waive or forfeit his Sixth Amendment right to conflict free counsel on the basis of writing a letter to his lawyer on the eve of trial which the trial court subsequently describes as expressing defendant's concerns that more time is needed to prepare for trial?

2. Does counsel's violation of the Advocate Witness Rule by unilaterally testifying as an unsworn witness against his client on a material issue in the case on the record of proceedings to the Judge in a bench trial, on the opening day of trial immediately prior to opening statements, where Defendant has not taken the stand or committed perjury, violate Defendant's Sixth Amendment right to effective assistance of counsel and further deprive Defendant of fair trial before an unbiased trier of fact?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Brooklyn, New York

Clerk of Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
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OPINIONS BELOW

On October 27, 2009, the Appellate Division of the New York State Supreme Court, Second Judicial Department, affirmed Petitioner's conviction of November 18, 2004, *People v. Zarro*, 66 A.D. 3d 1050, 887 N.Y.S. 2d 663 (A.D. 2 Dept. 2009). [Appendix A]. Prior to and during direct appeal, Petitioner filed an October 2004 post-verdict motion; a December 2005 CPL § 440 post-conviction motion, a September 2006 State Habeas Corpus proceeding, and May 2008 motion to renew the order denying the first post-conviction motion without a hearing. Petitioner included the federal constitutional claims of denial and ineffective assistance of counsel, and denial of a fair trial set forth in the instant Petition, in each of the foregoing State proceedings, all of which were denied without a hearing on these grounds. *People v. Zarro*, 9 N.Y.3d 884, 842 N.Y.S.2d 796, 874 N.E.2d 763 (Ct. App. 2007); *People v. Zarro*, 9 N.Y.3d 966, 848 N.Y.S.2d 34, 878 N.E.2d 618 (Ct. App. 2007); *People ex rel. Zarro v. McKinney*, 48 A.D.3d 844, 849 N.Y.S.2d 811 (A.D. 3 Dept. 2008); *People ex rel. Zarro v. McKinney*, 10 N.Y.3d 709, 859 N.Y.S.2d 394, 889 N.E.2d 81 (Ct. App. 2008).

On November 24, 2009, November 30, 2009, January 6, 2010, February 12, 2010 and March 24, 2010, Petitioner submitted an application with further submissions to the New York State Court of Appeals, for permission to appeal the Appellate Division's October 29, 2009 Decision. This application included copies of all briefs and motions, decisions and relevant portions of the record sub-

mitted to the Appellate Division, Second Judicial Department, on the appeal. The application was denied on May 5, 2010. *People v. Zarro*, 14 N.Y.3d 894, ___ N.Y.S.2d __, N.E.2d __ (Ct. App. 2010) [Appendix B].

On May 24, 2010, Petitioner timely filed a motion to reargue his application for leave to appeal to the New York Court of Appeals, and supplemented the application with further submissions on June 14, 2010. The motion for reconsideration was denied on August 6, 2010, __ N.Y.3d __, ___ N.Y.S.2d __, N.E.2d (Ct. App. 2010) [Appendix C].

[x] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix *A* to the petition and is

[x] reported at 66 A.D. 3d 1050, 875 N.Y.S. 2d 568; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The decisions of the New York Court of Appeals appear at Appendix B and C to the petition and

[x] "A" is reported at 14 N.Y.3d 894; and:

[ ] "B" is reported at 15 N.Y.3d 811.

[ ] is unpublished.

JURISDICTION

[X] For cases from **state courts:**

The date on which the highest state court decided my case was May 5, 2010. A copy of that decision appears at Appendix B.

[X] A timely petition for rehearing was thereafter denied on the following date: August 6, 2010, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I — FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE: PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 30, 2004, the opening day of Petitioner's bench trial, on indictment for Scheme to Defraud and Larceny by False Promise, Court appointed counsel, who had been assigned the previous month after Petitioner's retained counsel had been wrongfully arrested, and Petitioner had been restrained in parallel civil litigation from paying successor retained counsel, without a hearing on Petitioner's objections to his actual conflicts, voluntarily assumed the role of unsworn witness against Petitioner to the trier of fact on a material issue in the case, where Petitioner had not taken the stand or committed perjury.

In the course of his own unilateral motion to be relieved, which he made in reaction to a confidential letter he had received from Petitioner the day before expressing concerns that more time was needed to prepare for trial, court appointed counsel told the trier of fact who appointed him and with whom he had a twenty year personal and professional relationship, on the record of colloquy proceedings on March 30, 2004, in a trial which evolved solely around questions of Petitioner's honesty, that Petitioner was dishonest, could not be trusted to tell the truth, and that he could not believe anything Petitioner said. Court appointed counsel further stated that he could not zealously, intelligently and effectively represent Petitioner; that court appointed counsel's interests were adverse to Petitioner's, and that court appointed counsel would be forced to argue positions against Petitioner if he were not relieved. In so testifying, court appointed counsel violated New York DR 5-

102, and Code of Professional Responsibility, Cannon EC 1-1.

The prosecutors in that same March 30, 2004 colloquy, told the trier of fact, that Petitioner "spoke with fork tongue" and that his entire defense in the case would be "phony."

The trial judge, finder of fact, denied court appointed counsel's motion to be relieved without a hearing; never addressed or referred the violation of the Advocate Witness Rule to disciplinary authorities; did not sua sponte recuse himself or sua sponte declare a mistrial, nor did court appointed counsel so move. Court appointed counsel proceeded to try the case solely on the basis of the Grand Jury minutes without utilizing a court approved investigator or forensic accountant; without obtaining or reading existing *Brady* or *Rosario* material or any of the thousands of documents, books and records at issue; without interviewing or calling a single witness; and meeting with Petitioner only twice for under an hour for the duration of the case, and steadfastly refusing to put in a defense.

After a fifteen week trial, the trial Judge convicted Petitioner of 13 of 38 counts.

The trial court denied post-verdict and post-conviction motions without a hearing on these grounds and without ever addressing court appointed counsel's violation of the Advocate Witness Rule.

The Appellate Division, Second Judicial Department affirmed the conviction without addressing court appointed counsel's violation of the Advocate

Witness Rule, stating only that Petitioner had "engineered" court appointed counsel's motion to withdraw, and that "nothing" had occurred to vitiate Petitioner's March 22, 2004 jury waiver and that Petitioner's allegations of ineffective assistance of counsel were largely *de hors* of the record and that insofar as they appeared on the record were "without merit".

Petitioner is now in the seventh year of a sentence of 7 to 21 years in State prison. The following is a recitation of the facts based upon and from the records.

On September 10, 2002, the New York Attorney General arrested Petitioner and his attorney David Sall, Esq., on complaint based upon a September 5, 1997 purchase and financing of a golf property in Amenia, New York, from John Segalla, financed with a mortgage from Country Club funding in Denver, Colorado. The September 2002 arrests related back to a May 2000 civil lawsuit in State Supreme Court, for legal malpractice against Segalla attorney William Florence, in which Petitioner was a named Defendant concerning the 1997 golf course sale. [February 4, 2004 TT. pg. 6, lines 12-19].

In June 2000, Sall appeared as Petitioner's attorney in the Southern District New York, in a criminal investigation of matters related to the Segalla transaction and in particular, to William Florence, Segalla's lawyer, where Petitioner made a "proffer" to the United States Attorney, and in December 2000, Petitioner was cleared of any wrongdoing.

In June 2001, Sall appeared in the beginning stages of the subject State criminal proceeding on a motion to quash a subpoena.

Unable to continue as his criminal counsel, Sall was now Petitioner's co-defendant. Petitioner then retained Benedict Gullo, Esq., as his second choice of criminal counsel. Gullo appeared at Petitioner's arraignment on the September 10, 2002 arrest, as well as a second arrest on January 23, 2003, on complaint concerning Petitioner's transactions with Segalla attorney William Florence. Gullo filed a pre-indictment motion to suppress concerning the execution of search warrants on Petitioner's Office and Storage facility in July and August 2001.

The two sitting Dutchess County Court Judges recused themselves from the case due to the arrest of David Sall with Petitioner, because of their previous personal and professional association with Sall. Adjoining Putnam County Court Judge James T. Rooney, was appointed acting Dutchess County Court Judge and assigned to the case. Judge Rooney denied the suppression motion without a hearing, and remained assigned to the case for its duration.

In February 2003, Petitioner was indicted on the prior Segalla, Country Club Funding and Florence arrest charges, and on an additional thirty-one counts involving allegations of false promise on contractual matters pertaining to debtor creditor and fee simple real estate transactions. Sall was never indicted or even mentioned to the Grand Jury, and the charges against him were dismissed as to him by the local criminal

court. Benedict Gullo appeared for Petitioner at arraignment on indictment. Petitioner plead not guilty on all counts at arraignment.

In April 2003, Gullo filed an omnibus motion on Petitioner's behalf.

In May 2003, Segalla, obtained a TRO and Order of Attachment in the parallel civil action preventing Petitioner from continuing to meet the terms of Gullo's retainer agreement.

In July 2003, the TRO was converted to an Order of Attachment.

On October 24, 2003, Petitioner entered into a settlement agreement with Segalla.

On November 16, 2003, Gullo moved to be relieved as Petitioner's criminal counsel specifically stating as to the grounds for his motion, that the TRO/Order in the parallel civil case had prevented Petitioner from continuing to pay his fees and that the effect of the restraints were such that Petitioner would be unable to generate funds to pay him in the future. [See December 2005 CPL § 440 motion, Gullo affidavit § 2, Cf. Disciplinary Rule 1.16(B)(5), Gullo affidavit § 3, citing financial burden on counsel]. A hearing was scheduled in the criminal court for December 2, 2003.

On November 21, 2003, Gullo faxed Petitioner a memo urging him to retain replacement counsel and support his motion to withdraw. [*Exhibit H* to December 2005 CPL § 440 motion].

On December 1, 2003, twenty days after Gullo moved to withdraw on the basis of the TRO and Order of Attachment, Petitioner replied to Gullo's

letter, recounting the events leading to his motion to withdraw, and requesting that he continue in the case. [*Exhibit I* to December 2005 CPL § 440 motion].

On December 2, 2003, Gullo and Petitioner appeared at the hearing on his motion, where Gullo changed the grounds for his motion from financial reasons to deterioration in the attorney client relationship. When asked on the record for his position on the revised Gullo motion, Petitioner stated that he did not oppose the motion, but emphasized, that any deterioration of his relationship with Gullo had solely to do with financial constraints imposed on him by Segalla in the parallel civil action which prevented him from paying Gullo, exactly as Gullo had stated in his November 16, 2003 original motion to withdraw. The court relieved Gullo without conducting a hearing on the TRO/Order and its effect on the September 2002 Gullo retainer agreement, and on Petitioner's right to counsel of his own choosing, and left Petitioner unrepresented from that point forward. [See *Exhibit I* page 7, December 2005 CPL § 440 motion].

The court ordered Petitioner to apply to the Dutchess County Public Defender by December 11, 2003. Petitioner informed the court that he wanted his own retained counsel. Petitioner complied with the court's order. The Dutchess County Defender declined representation based upon David Sall's 2002 arrest with Petitioner in the case, due to Sall's prior employment with the Dutchess County Defenders Office. Petitioner then proceeded to interview potential defense counsel

who he could afford to pay, and who could be available and prepared to commence trial by the court's firm commencement date of March 15, 2004. Petitioner selected Paul Gruner, Esq., of Kingston, New York, an experienced criminal defense attorney who appeared in court with Petitioner at *a* January 2004 conference and advised the court that he made suitable financial arrangements with Petitioner, but that, he could not be available and prepared for a March 15, 2004 trial date; and Dennis Schlenker, Esq., a qualified experienced criminal defense attorney from Albany, New York, who with whom Petitioner had agreed on retainer terms, who wrote the court to advise that he could not commence a complex, white collar criminal case of such magnitude, in less than two months and would need additional time to prepare [February 4, 2004 proceedings, TT. pg. 3, lines 18-25].

On February 4, 2004, Petitioner appeared at another of a series of almost weekly appearances to update the court on his representation status. The court convened and introduced Mr. Roden. At the court's direction, Petitioner gave Mr. Roden a letter he had written to the court dated February 4, 2004, reciting the facts and circumstances leading to Gullo's withdrawal [February 4, 2004 TT. Pg. 7, lines 21-25]. The court ordered a recess for Petitioner to meet with Mr. Roden. Petitioner met Mr. Roden in the Judge's Court Attorney's Office for about an hour. Mr. Roden began the meeting by discussing trial conflicts of interest: (1) He and his first wife had a twenty-year personal relationship with one of the prosecutors in the case, Ms. Lustman; (2) He had discussed the case with

Petitioner's original codefendant David Sall, after Sall's arrest; (3) He had represented one of the complainants in the indictment Frank Coluccio in a criminal matter. Petitioner told Mr. Roden that Petitioner was not comfortable with Mr. Roden's conflicts, and wished to consult his own counsel, and to be represented by his own counsel [February 4, 2004 TT. pg. 5, lines 19-2].

Court reconvened on the record and Mr. Roden recounted the meeting to the court, and recited on the record that he had reviewed Petitioner's February 4, 2004 letter, and found it to be a cogent and reasonable presentation of the facts concerning the status of Petitioner's representation; recommended that the court read the letter; and stated that Petitioner was not comfortable with Mr. Roden's conflicts, and wished to discuss the matter with another lawyer [February 4, 2004 TT. Pg. 7, lines 21-25], and that in any event retained counsel or Mr. Roden would need additional time to prepare beyond March 15, 2004 [February 4, 2004 TT. pg. 8, lines 2-6]. The court stated that although it was concerned about undue delay, it might be "more liberal and flexible within reason" in considering request for more time to prepare [February 4, 2004 TT. pg. 8, lines 2-6; pg. 9, lines 11-14]. The court then reviewed Mr. Roden's conflicts, and the Attorney General, at the Court's prompting suggested that it could eliminate the Coluccio conflict by dropping the count in the indictment relating to Coluccio [February 4, 2004 TT. pg. 17, lines 24-25; pg. 18, lines 2-3]. The court then accepted the Attorney General's offer to drop the Colaccio count [February 4, 2004 TT. pg. 19, lines 4-10], and went on

record advising Petitioner of the court's high estimation of Mr. Roden's professional abilities, based upon a twenty-year professional relationship with him [February 4, 2004 TT. pg. 5, lines 2-18]. Mr. Roden reiterated that Petitioner wished to discuss Mr. Roden's conflicts especially the Coluccio conflict, which Mr. Roden conceded was the most serious, with another lawyer [February 4, 2004 'TT. pg. 15, lines 19-25; pg. 16, lines 2-3] and that Petitioner wanted to consult again with Dennis Schlenker to see if perhaps he could take the case under the scheduling restraints the court had imposed [February 4, 2004 TT. pg. 16, lines 4-10].

The court ignored the conflict [February 4, 2004 TT. pg. 18, lines 2425], Assistant Attorney General Mullane stated, . . . well your Honor, actually, the People will go so far as [continued February 4, 2004 TT. pg. 26, lines 2-3], consider not calling Mr. Coluccio if it would advance the case forward [February 4, 2004 TT. pg. 19, lines 4-15], the court states, . . . okay, that renders it a non issue then. If Mr. Coluccio is not part of this case and therefore that part of the indictment is not going to be the subject of any of the testimony at trial, that obviates that issue completely.

On [February 4, 2004 TT. pg. 20, lines 16-23], the court addressed Mr. Roden's disclosed twenty-year relationship with one of the prosecutors, Rhonda Lustman. The court said it did not know if the conflict had an impact on Mr. Roden's ability to try the case, and left the decision to Mr. Roden. At [February 4, 2004 TT. pg. 20 lines 24-25, pg. 21, lines 2-16], Mr. Roden states that he had tried to address it with Petitioner, and that he under-

stood Petitioner's misgivings, but that, just as in the case of Mr. Roden's professional and personal relationship with the trial Judge Rooney, many of the people Mr. Roden worked with were individuals with whom he had professional and personal relationships. Mr. Roden and the court left the conflict unresolved.

The court then turned to the Sall conflict at [February 4, 2010 TT. pg. 21, lines 17-25, pg. 22, lines 2-10], the court recited at [February 4, 2004 TT. pg. 21, lines 2-10], "... Sall although not indicted was originally a co-defendant when this case initiated in Local Justice Court, and was not named in the indictment, was not indicted and currently has no charges against him in connection with this case, and would you be willing to make a record just so we know exactly the extent of your familiarity with Mr. Sall, what conversation you had with him? At [February 4, 2004 colloqy pg. 22, lines 11-23], MR. RODEN: .... Well Judge, I tried to explain to Mr. Zarro just how long I had known Mr. Sall, and I would guess between 10 and 15 years, but not in any professional manner, we haven't—I don't believe we have ever been co-counsel in a case ... I haven't socialized with him in any way ... I know I think we have [February 4, 2004 TT. pg. 23, lines 2-15], a mutual respect for each other. I have some respect for David Sall. What happened was I believe it was the Monday following the arrest ... I ran into Mr. Sall on Cannon Street, ... He proceeded to explain to me that he was innocent, and at [February 4, 2004 17 TT. pg. 24, lines 8-18], THE COURT: okay, that the record is clear ... so that it can be considered by the parties.... Now

basically, I think what asking for at this point *is* an adjournment until Tuesday, so that you can further discuss these issues with Mr. Zarro and Mr. Zarro can consider what was just placed on the record, and we can go forward with further proceedings. At [February 4, 2004 71 TT. pg. 26, lines 6-25, pg. 27, lines 2-15], the court establishes its trial schedule and its determination to begin jury selection on March 29, 2004, and to commence trial because the trial was expected to go 8 to 16 weeks, and the court wanted the trial concluded before summer vacations got in the way [February 4, 2004 TT. pg. 28, lines 1-22].

At February 4, 2004 TT. pg. 28, lines 23-25, pg. 29, lines 5-16], the court admonishes Petitioner that any retained counsel he interviews for trial must be ready to start trial and pick a jury on March 29, 2004. At [February 4, 2004 TT. pg. 17, lines 9-17], Mr. Roden states he had not looked at any documents, only "the tip of the iceberg" and would need to do so before committing himself. Yet, he would go on to say a week later that he was prepared to try this complex, document centered white collar fifteen week trial involving hundreds of thousands of pages of documents over fifty prosecution witnesses, and ten to twenty prospective defense witnesses, which the government had been investigating and preparing for seven years [February 4, 2004 TT. pg. 4, lines 18-22], and—"jump in with both feet".

The court repeated at [February 4, 2004 TT. pg. 30, lines 11-25, pg. 31, lines 2-3], that any retained counsel Petitioner would select would have to be ready on March 29, 2004.

At [February 4, 2004 TT. pg. 31, lines 4-25], Petitioner informed the court that he had advised all potential trial counsel of this fact and that he had consulted nine such attorneys. Petitioner at [February 4, 2004 TT. pg. 31, lines 11-25], again directed the court to Petitioner's letter dated February 4, 2004, which he gave to Mr. Roden concerning Gullo's withdrawal, and points out that he had tried to bring these facts to the court's attention in his last two appearances at [February 4, 2004 TT. pg. 31, lines 21-25, pg. 32, lines 2-9]. Petitioner states to the court that both Mr. Gruner and Mr. Schlenker would be willing to represent Petitioner but for the court's March 29, 2004 trial commencement date. Petitioner repeated his desire for the court to review his February 4, 2004 letter. At [February 4, 2004 TT. pg. 32, lines 10-14], the court ignored Petitioner's request, and at [February 4, 2004 TT. pg. 32, lines 16-25], the court repeats its firm March 29, 2004 trial commencement date On [February 4, 2004 TT. pg. 32, lines 2-8, pg. 33, lines 2-4], the court states it will await Petitioner's decision on Mr. Roden's appointment on the adjoined date of February 10, 2004 at 3:00 PM.

The hearing was adjourned to February 10, 2004, for further consideration of Petitioner's representation status. At that point, Petitioner had been attending weekly court from December 2, 2003, thru February 10, 2004, critical periods in the case without legal representation. When the February 10, 2004 conference convened, the court effectively eliminated both Mr. Gruner and Mr. Schlenker as potential trial counsel by refusing to

extend the trial commencement beyond March 29, 2004 [February 10, 2004 TT. pgs. 7-8] to accommodate them. The court dismissed the so-called Coluccio count of the indictment without any formal amendment of the indictment, and glossed over the other two Roden conflicts concerning Lustman and Sall.

It is clear from the record of proceedings on February 10, 2004, that the court appointed Kenneth Roden before the February 10, 2004 conference, before resolving the Roden conflicts and without giving Petitioner an opportunity to be heard on the conflicts, as the court indicated it would, over Petitioner's objections to Mr. Roden's conflicts and appointment and without Petitioner's waiver or consent, while all along refusing to even look at Petitioner's February 4, 2004 letter to the court, with which Mr. Roden had stated his agreement.

At [February 10, 2004 TT. pg. 4, lines 7-16], MR. RODEN: we could not meet—snowed in. I am prepared to accept this assignment. MR. RODEN: I'm not sure if Mr. Zarro's concerns have been addressed . . . what I thought was the major one which was the Coluccio's Legion Fireworks matter, because I believe that if I'm assigned the Attorney General would withdraw that count in the indictment. MS. MULLANE: That is correct.

At [February 10, 2004 TT. pg. 4, lines 18-22], MR. RODEN: So if Mr. Zarro has other objections to me being counsel, then I'd ask him to voice them to the court at this time. Otherwise, I'm prepared to jump in with both feet, so to speak. THE COURT: Ok Mr. Zarro?

At [Feb. 10, 2004 TT. pg 4, lines 24-25, (continued at) pg. 5, lines 2-25], MR. ZARRO: Your Honor. I remain concerned about the conflicts. The one with Mr. Coluccio . . . I have consulted . . . . and the other two [conflicts] I have consulted with two attorneys as I said I would, a Mr. Fuereisen and Mr. David Lenefsky on.

At [Feb. 10. 2004 TT. pg. 6, lines 2-15], . . . THE COURT: Well there's been a whole series of lawyers who have not been formally — MR. ZARRO: Yes I understand. THE COURT: — retained - what I need is somebody to be retained ***because I have an attorney who I have appointed to represent you.*** [emphasis by underline added].

At [Feb. 10, 2004 TT. pg. 7, lines 16-25, and pg. 9, lines 12-14, and pg. 9, lines 22-24], MR. ZARRO: Part of my problem in the part other than finances, your Honor, have been getting lawyers. This will be the tenth lawyer since December 10th, I have talked to. Getting lawyers who (A) could afford and (B) could meet the scheduling requirements of this case given what's known and not known about it, and that's been my problem. I have been trying diligently including over this weekend with Mr. Lenefsky. THE COURT: All right, what are your other objections to Mr. Roden. In other words what I am apt to do . . . and I'd like to hear from the Attorney General on this. What I am considering doing is this: appointing Mr. Roden today as counsel [N.B. the court stated at TT. pg. 6, lines 12-15, that it had already appointed Mr. Roden], and I'd like to hear your positions on it and if another attorney, Mr. Lenefsky or any other attorney is available for trial and

files a notice of appearance then at that time he can be substituted upon application from Mr. Roden, but I'm not willing to leave this open without counsel at this time. So I'm not precluding you Mr. Zarro from having counsel of your choice represent you. However, given the situation and given the proceedings to date and given [Feb. 10, 2004 TT. pg. 11, lines 2-13], THE COURT: The numerous appearances we have been here and the number of names given to the court as possible lawyers, none of whom have filed a notice of appearance. I don't want to leave this open. I'm ready — you know —I'm ready to make an assignment of Mr. Roden, and quite frankly, I'll tell you, among lawyers in the area that have experience in this type of case, looking at the 18(b) availability list in Dutchess County, I think he's well qualified to handle the case.

The record of the proceedings of February 4, 2004 and February 10, 2004, as referenced on the foregoing, prove that Roden was appointed over Petitioner's objection to his disclosed conflicts; without Petitioner's consent and over Petitioner's objection to being denied time to secure retained counsel with whom he had come to retainer terms but who could not be prepared to go to trial by March 29, 2004; that Petitioner four times attempted to present to the court with his February 4, 2004 letter, with enclosures, which traced the background and history concerning interference with Petitioner's right to counsel of choice, and the withdrawal of Benedict Gullo, and that Kenneth Roden urged the court to consider the letter in which Petitioner requested additional time for retained or appointed counsel to try the case;

that the court was aware of David Sall's arrest and that Kenneth Roden's conflict concerning Sall involved the issue of deprivation of Sall's representation of Petitioner; that the court and Roden failed to act on Roden's unwaivable conflict concerning Frank Coluccio and that dropping the indictment count as to him did not eliminate the conflict; that Roden's relationship with Rhonda Lustman was not an insignificant conflict and was left unresolved and that the court had an obligation to conduct a hearing, at which Petitioner could be represented by conflict free counsel concerning the Roden conflicts. The February 4, 2004 and February 10, 2004 proceedings also confirm the close relationship between Mr. Roden and the trial court, and the Judge's trust in what Mr. Roden said. The February 4, 2004 and February 10, 2004 proceedings provided the backdrop for the events to follow on March 30, 2004, and the further accumulation of Roden conflicts.

On February 11, 2004, Petitioner had over 27 cartons of documents related to the indictment sent to Mr. Roden's office. From February 10, 2004 to March 29, 2004 Mr. Roden met with Petitioner twice for under one hour at Mr. Roden's request. Petitioner faxed Mr. Roden names of witnesses and parties necessary for him to contact and subpoena and identified numerous documents also necessary for Mr. Roden to subpoena. Mr. Roden promised to apply for subpoenas but never did. Mr. Roden met with Petitioner on March 18, 2004 and Petitioner expressed concern that more time was needed to prepare. Mr. Roden then urged Petitioner to waive a jury trial and opt for a bench

trial so that the time allocated for jury selection beginning on March 29, 2004, could be used to prepare for trial.

On March 18, 2004, Petitioner faxed Mr. Roden a memo concerning the upcoming March 22, 2004 court appearance when a jury waiver would be addressed. The memo contained conditions for the waiver and set forth matters of concern to Petitioner. On March 28, 2010, Mr. Roden made application to the court for approval of funds to retain an investigator and forensic accountant, emphasizing that he could not effectively represent Petitioner without these services. The court approved both the investigator and forensic accountant, but, Mr. Roden never employed or utilized either one. Petitioner did not hear from and could not reach Mr. Roden from March 22, 2004 to March 28, 2004. Petitioner drove from Vermont to Fishkill, New York, to Mr. Roden's office to meet him on March 28, 2004, but after waiting from 10:00 AM to 4:20 PM, Petitioner was told that Mr. Roden was in court, and with other clients. Petitioner's bench trial was set to commence the following day, and Mr. Roden had not advised Petitioner if there was to be a two week adjournment as planned, to prepare for trial. On the way back to Vermont, Petitioner received a call on his cell phone from Mr. Roden, informing Petitioner there would be no adjournment and that if Petitioner wanted one he would have to request it from the Judge himself, and that the case would be tried Mr. Roden's way or Petitioner could try it himself. The following morning March 29, 2004, Petitioner wrote a letter to Mr. Roden and delivered it to him when he arrived in court at 9:00 AM that day *[Court*

Exhibit A]. The next day March 30, 2004, Mr. Roden informed Petitioner that there was to be a chamber's conference from which Petitioner was excluded. Petitioner asked Mr. Roden what this was about, he said: "I am withdrawing, I cannot represent you". Mr. Roden and the Attorney General proceeded to chambers and emerged about 45 minutes later and court convened. The Judge said — Mr. Zarro, I understand you have a motion, Mr. Roden interrupted — "actually Judge, its my motion", and he proceeded. Armed with cases he had researched at the court's request, it was apparent he had been discussing the matter with the court after he read Petitioner's letter the day before. Mr. Roden then proceeded to tell the trier of fact who appointed him, and had vouched for Mr. Roden's good reputation on the record, in this criminal trial about to start which involved solely questions of Petitioner's honesty, the following: . . . the letter [of March 29, 2004], makes accusations against me which are untrue and unwarranted . . . [March 30, 2004 colloqy pg. 2, lines 17-19; citing *People v. Sides*, 75 N.Y.2d 822, 552 N.Y.S.2d 555, 551 N.E.2d 1233 (Ct. App. 1990)], a defendant and counsel in *Sides* argued that there was a complete breakdown of communication and lack of trust. Mr. Roden at colloqy pgs 3-4: "I am making that same representation here. I don't think that I can properly try this case" . . . "I don't feel that I can intelligently represent my client, because things I have communicated to him within the attorney/client privilege are misstated and come out differently in letters . . . I cannot possibly hope to try this case and zealously represent him when I feel at the same time I have to

protect myself from what he will do when I make any hind of representation".

". . . Here I am saying that I feel there is an irreconcilable conflict . . . The conflict is based upon my inability to communicate and my clients inability to communicate with me honestly . . . [March 30, 2004 colloqy pg. 5, lines 20-25, pg. 6, lines 1-25], it is my position, that it is impossible for me to zealously represent Mr. Zarro, when what is happening here is that he is accusing me of not doing just what I feel I have done to the best of my ability. I understand the court's concerns about the problems that would arise as a result of my being relieved of this assignment, but, nevertheless its my conflict, its not — my desire here is not — to but more time for Mr. Zarro, or, but more time for myself. I'm not looking to delay these proceedings at all. In fact, were it not for what happened, I was fully prepared to proceed with this matter. The problem is that I cannot, in good conscience stand before you and say that I am zealously representing this man . . . In fact, to the contrary, I cannot zealously represent this man based upon the representations I find in this letter . . . It's worse, yes and more. Its not the lack or cooperation, its the lack of my feeling of honesty. I can't trust anything he says. I have no trust in what he is telling me".

On colloqy TT. pg. 7, Petitioner offers a copy of the March 29, 2004 letter to the court, and then Petitioner reminds the court that he several times offered a letter to the court to address the matter of Gullo's withdrawal for financial reasons, and that at the court's instruction, Petitioner gave the

letter to Mr. Roden to present to the court on February 4, 2004 [February 4, 2004 TT. pg. 7, lines 21-25, pg. 8, line 1].

Petitioner's March 30, 2004 colloqy at pg. 9, lines 9-24: "Since meeting Mr. Roden, I have been asking him whether or not he had the time to prepare. . . If I said anything to offend you Mr. Roden, I apologize. I thought it was factual. If there is anything you want to tell me about, correct me. I have been asking him since we met to tell me how we are going to prepare these materials. I sent twenty-seven boxes of material to him within days of his appointment. I met with him twice in his office, sent him numerous faxes. . .".

Then the prosecutors spoke. At March 30, 2004 collogy TT. pg. 12, lines 10-12; pg. 13, lines 16-25. REBECCA MULLANE: ". . . This man was trained as a lawyer. He knows how to obstruct the system, he wants to take control, control of this court, of the people .. This is a very cunning, calculating, manipulative Defendant . . . as usual, he speaks with fork tongue . . . But I can tell you this based upon the evidence, and based upon the investigation we have conducted any claims made by this Defendant about his counsel are as phony as his defense with respect to all these victims whose lives he has left in financial ruin . . .".

March 30, 2004 calloqy TT. pg. 16, lines 3-4. Petitioner: "I will give you the letter that sets it forth. There's nothing mysterious about it . . .".

As if all of the above were not damaging enough, Mr. Roden again, unilaterally testified again to leave no doubt about the fact that he is and will continue to be an adverse witness against Peti-

tion, on critical matters pertaining to the defense. March 30, 2004 collogy at TT. pg. 19, lines 920. ". . . If I could add one thing before you leave and make a decision? I think what has happened in this courtroom points out just what my conflict is, that is, that I am now forced into a position of arguing positions that are contrary to my client. I understand the court's concern here, but, I think that what is obvious here is that the conflict is causing a problem where I am basically in a position of advocating the things he submitted as exhibits. I'm going to have to argue against and that is the crux of the irreconcilable conflict. My position has become adverse to his . . .".

Here, Mr. Roden gives his third round of adverse testimony against Petitioner unprovoked, unsolicited, and irreparably damaging on material issues in the case.

The trial court fully understood that Petitioner's March 29, 2004 letter was not alleging a breakdown of the relationship or an attempt to "engineer" a conflict or a violation of the Advocate Witness Rule, but rather was a letter expressing a concern that more time was needed to prepare.

March 30, 2004 colloqy TT. pg. 25, lines 7-10, THE COURT: ". . . Now in reviewing the letter of Mr. Zarro, which I indicated was Defendant's Exhibit A, I do not see that letter so much as alleging a breakdown in the relationship, but, rather a concern about time . . . . and at March 30, 2004 colloqy TT. pg. 25, lines 18-25 . . . THE COURT: "However, what I am going to do is to address what seems to be the primary concern of Mr. Zarro in reading his letter . . . His letter seems

to indicate he has concerns that certain witnesses that he wants defense counsel to consider calling have not been prepared, and he wants further time to prepare and get the witnesses ready to testify on the defense case'. . . . "That is at least a good part of the letter that I am reading . . .' ". The Roden conflicts remained unresolved.

Assistant Attorney General Lustman ended the session by moving to have Petitioner remanded and his bail revoked, because of his "state of mind" in writing the March 29, 2004 letter.

March 30, 2004 colloqy TT. pg. 27, lines 9-12. ". . . . I think this morning, particularly after seeing the Defendant's Exhibit, that the kind of control this court has over Defendant is really not sufficient . . .".

The trial commenced with opening statements after luncheon recess on March 30, 2004, and Petitioner was forced to proceed to trial with a court appointed lawyer who was conflicted, and belligerent, and had not interviewed or subpoenaed a single witness. In point of fact, by operation of the Roden statements to the court on March 30, 2004, Petitioner was unrepresented for the duration of the trial, and was not afforded a hearing on the Roden conflict, with separate counsel to represent Petitioner's interests as required by federal law. Roden insisted that Petitioner waive a defense lest he would again move to withdraw and ignored Petitioner's multiple written demands that he put in a defense.

On July 8, 2004, Petitioner was convicted on 13 of the 38 counts in the indictment, Petitioner's $500,000.00 bail bond revoked. Petitioner was

then remanded to jail, and has been in prison ever since. In September 2004, after retaining new counsel and filing a post-verdict motion based on Mr. Roden's conflicts of interest, ineffective assistance of counsel, denial of counsel, failure to disclose evidence, witness tampering and newly discovered evidence, all of which were denied by the trial court deciding without a hearing, that it had "effectively resolved" the Roden conflicts at TT. pg. 25, when it acknowledged that Petitioner's March 29, 2004 letter was not so much an expression of differences with counsel, but, an expression of concern that more time was needed to prepare, and agreed to allow Petitioner to interview witnesses and obtain documents after the Peoples case was concluded, and on "off days" from trial. [Mr. Roden refused to work on off days and declined the court's offer of a week's recess to prepare after the People rested and refused to put in a defense]. Petitioner was sentenced to 7 to 21 years in State Prison. Petitioner filed a notice of appeal on November 19, 2004, during the pendency of which a post-conviction motion setting forth the federal grounds presented in this Certiorari application, and a State Writ of Habeas Corpus were filed. All post-conviction relief was denied without hearings. On page 29 of the court's December 31, 2006 decision on the initial CPL § 440, the court again stated that it had "effectively resolved" the Roden conflict on colloqy of the March 30, 2004 proceedings by acknowledging at TT. pg. 25, that the Petitioner's letter was not an expression of irreconcilable differences with Mr. Roden as it was an expression that more time was needed to prepare, and that by agreeing to

allow time on trial off days and during a short adjournment after the People rested their case, for Petitioner to obtain documents and interview witnesses, the court had adequately addressed Petitioner's concerns and "resolved" the Roden conflict. The court went on in its December 31, 2006 decision, to note that it was Petitioner, not Mr. Roden who expressed that more time was needed to prepare, and the court then pronounced that constitutionally mandated trial preparation was a "trial tactic" on which defense counsel was entitled to deference, and that at no time did Mr. Roden, "experienced trial counsel state that he was unprepared" and that because Mr. Roden had reviewed voluminous Grand Jury materials [only] there was no need for further preparation.

Therefore, after stating on the record that the Petitioner's letter was not an assertion of irreconcilable differences with counsel, but, merely an expression of concern over lack of preparedness which the court said it had addressed, hence, "effectively resolving" the Roden conflict, the court on page 29, of its December 31, 2006 decision, also finds that it was "Defendant's own actions" [the same letter] and concerns that caused the dispute and resultant application of Mr. Roden and denied the motion. The court never once addressed Mr. Roden's self pronounced unwaivable conflicts on material issues on March 30, 2004 and never conducted a hearing on the conflicts, where Petitioner could be separately represented; never addressed Mr. Roden's violation of the Advocate Witness Rule on material issues, or Mr. Roden's prejudicial statements about Petitioner to the court; never

addressed the denial of counsel issues concerning the arrest of David Sall and restraint on payments to Benedict Gullo; and thusly did not decide these federal claims on the merits. Nor has the Appellate Division, Second Judicial Department or The New York Court of Appeals ever addressed or decided any of these federal claims on the merits.

REASONS FOR GRANTING THE PETITION

The Circuit Courts, differ in their rulings on the forfeiture issue and have been constrained to deny Habeas relief to applicants, even where the record demonstrates clear Sixth and Fourteenth Amendment violations. *Fischetti v. Johnson*, 384 F.3d 140 (3rd Cir. 2004); *Gilchrist v. O'Keefe*, 260 F.3d 87 (2nd Cir. 2001); *Wilkerson v. Klein*, 412 F.3d 449 (3rd Cir. 2005); *United States v. Welty*, 674 F.2d 185 (3rd Cir. 1982); *United States v. Goldberg*, 67 F.3d 1092 (3rd Cir. 1995). The Ninth Circuit has held that even an inference of adverse testimony against a defendant by his counsel in a bench trial, however well intentioned, requires reversal. *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978).

This Court's general Sixth Amendment related decisions have been read as qualified by the trial court's power to remedy abuse of Sixth Amendment rights through forfeiture, without any parameters having been established as to what degree of defendant "conduct" or "misconduct" constitutes grounds for forfeiture or involuntary waiver.

The New York Supreme Court Appellate Division, Second Judicial Department's October 27, 2009 decision, that the trial Judge acted providently in forcing Petitioner to trial represented by an actually conflicted lawyer who had plainly violated the Advocate Witness Rule as to Petitioner, based upon, according to the Appellate Division, Second Judicial Department, Petitioner having allegedly "engineered" counsel's conflict, boils the issue down to Defendant's purported involuntary "waiver" or "forfeiture" of his right to conflict free counsel by writing to his lawyer on the eve of trial and in so doing, according to the Appellate Division, Second Judicial Department, somehow foreseeing that Mr. Roden would do what he did and say what he said on the record of colloqy proceedings on March 30, 2004.

Compelling Petitioner to proceed to trial with a conflicted lawyer of the magnitude Mr. Roden was actually conflicted on material issues, is denial of counsel, and since the conflicts were not waivable or resolved, and Petitioner made no voluntary waiver and no reasonable defendant would have wanted Mr. Roden to represent him after Mr. Roden's statements on the record of March 30, 2004; the Appellate Division, Second Judicial Department's October 27, 2009 decision, creates a dangerous and ambiguous fiction which establishs that a criminal defendant's Sixth Amendment right to counsel is dissolvable at the discretion of the trial court, without a hearing *if* court appointed counsel takes umbridge with a given communication from his client.

This Court has never defined what kind of "defendant conduct" could possibly give rise to the involuntary waiver or forfeiture of the right to conflict free counsel guaranteed by the Sixth, and Fourteenth Amendments, except in some cases where the defendant has committed perjury on the witness stand. In fact, while the Supreme Court has held that certain Sixth Amendment rights (e.g., right to be present at trial) might be forfeitable given some serious defendant misconduct, the Court has never ruled that the right of a criminal defendant to counsel, is forfeitable under any circumstances, and in any event, has never actually defined "serious misconduct".

The record in this case will establish that Petitioner's demeanor and conduct throughout the criminal proceedings to the court and to Mr. Roden were exemplary and the record will further show that Petitioner demonstrated his reverence for the court and the legal process throughout the proceedings against him and that he did not commit perjury.

What Petitioner did do in the face of multiple wrongful deprivations of counsel of his own choice, and makes no apology for, was try the best he could to document for the record, on December 2, 2003; February 4, 2004; February 10, 2004 and in his February 4, 2004 letter to the court, and his March 29, 2004 letter to Kenneth Roden, all on the record of proceedings, the accumulation of events that led to his embarking on what had curiously developed into one of the most extensive white collar criminal trials in recent New York history, including over 50 prosecution witnesses,

368 prosecution trial exhibits and hundreds of thousands of pages of documents, books and records, represented by a lawyer appointed the month before the trial commencement date who took no steps to prepare for such a responsibility, relied exclusively on Grand Jury minutes released to him for his trial preparation and who had theretofore admitted on the record at the time of his appointment over Petitioner's objection, to multiple actual conflicts of interest on material issues in the case.

Because there is no definitive Supreme Court ruling on what defendant conduct constitutes "serious misconduct" as grounds for waiver or forfeiture of the Sixth Amendment right to conflict free counsel in a criminal case, or whether the right to counsel is capable of being forfeited at all, Petitioner respectfully submits that the Court should grant this application, and in accepting the case, establish parameters for the Circuits to be guided by in the future defining defendant conduct which results in involuntary waiver or forfeiture of the right to conflict free counsel.

As the Appellate Division, Second Judicial Department's holding in Petitioner's case now stands, a criminal defendant who writes a letter to his lawyer expressing concern over the status of his case runs the risk of forfeiting his right to conflict free counsel and of counsel being completely relieved of his ethical obligations under the Advocate Witness Rule.

This case has considerable national significance and also has significant First Amendment implications insofar as forfeiture is based upon a

Defendant's letter expressing legitimate concerns to his lawyer, and the letter becomes the basis for his losing his Sixth Amendment right to counsel.

Perhaps if the trial court at bar had relieved Mr. Roden, and after notice and due caution, required Petitioner to proceed self-represented, as in *Wilkerson*, supra, that may have provided at least a plausible constitutional dilemma. However, under no circumstances permitted by standing decisions of this Court, existing during the pendency of this case, could the trial court, without conducting a single hearing, where Petitioner could have his interests protected by conflict free counsel, deny Petitioner his right to be represented by counsel of his choice by virtue of the arrest of one lawyer and the restraining of payment to another, and then force Petitioner to go to trial represented by a court appointed lawyer with pronounced actual, operating conflicts of interest on material issues upon his appointment, over Petitioner's objections, who further made himself an adversary by testifying against Petitioner as an unsworn witness on material issues in the case to the trier of fact, prior to opening statements, where Petitioner had not taken the stand or committed perjury. *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Caplin & Drysdale v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); *United States v. Monsanto*, 491 U.S. 617, 109 S.Ct. 2667, 105 L.Ed.2d 528 (1989);

The federal grounds set forth in this Petition and the cases cited above were all presented to the Appellate Division, Second Judicial Department, and the New York Court of Appeals in this case.

The two cases which this Court has decided on forfeiture of a defendant's Sixth Amendment rights other than right to counsel, were based upon conduct which was egregious on its face. These cases depicted facts and conduct which were by far distinguishable from those at bar.

In *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), the Court addressed whether an accused can claim the benefit of [this] constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly and disruptive, that it is exceedingly difficult or wholly impossible to carry on the trial.

In *Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973), the defendant failed to appear for the remainder of his trial after attending its beginning. The one case decided by this court concerning counsel testifing against his client, is worlds apart from the case at bar and involved counsel's restrained reaction to his client

having perjured himself on the stand. *Nix v. Whiteside,* 106 S. Ct. 98, 47 U.S. 156

The United States Court of Appeals for the Second Circuit has addressed the state of Supreme Court standards on the forfeiture issue this way. "Having thus established that Supreme Court precedent recognizes a distinction between waiver and forfeiture on constitutional rights and that there is no Supreme Court holding that an indigent defendant may not forfeit his right to counsel through misconduct nor a general Supreme Court holding that a defendant may not forfeit a constitutional right, we conclude that the state court rulings were not "contrary to clearly established federal law as determined by the Supreme Court". *Gilchrist v. O'Keefe,* 260 F.3d 87 (2nd Cir. 2001) The Second Circuit however nonetheless proceeded to inquire as to whether or not a state court's holding that a petitioner forfeited his right to counsel based upon a single, apparently spontaneous violent incident constituted an "unreasonable application" of the more general principles in Supreme Court cases such as *Gideon v. Wainwright,* 372 U.S. at 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); and *McConnell v. Rhay,* 393 U.S. 2, 3, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968); and determined that given the Supreme Court's recognition that important constitutional rights may be forfeited based upon "serious defendant misconduct" it is essential that the Supreme Court decide a case which defines "serious". "This step is necessary because the lack of Supreme Court precedent specifically addressing forfeiture of the right to counsel does not mean that any determination

that such fundamental right has been forfeited, even if based on an utterly trivial ground, would survive habeas review". *Gilchrist v. O'Keefe*, 260 F.3d 87, 97 (2nd Cir. 2001); Cf. *Jones v. Stinson*, 229 F.3d 112, 119-20 (2nd Cir. 2000).

For these reasons Petitioner respectfully requests that the Court grant this Petition, and review this case with a view toward determining what could constitute "serious defendant misconduct" to the level of involuntary waiver or forfeiture by a State criminal defendant of the right to conflict free counsel of his own choice, guaranteed by the Sixth and Fourteenth Amendments, and whether or not based upon the record in this case, Petitioner's letter of March 29, 2004 constituted such "serious misconduct", as to cause the Appellate Division, Second Judicial Department defacto to decree the involuntary waiver or forfeiture of these rights, when it characterized the Roden motion to withdraw as having been "engineered" by Petitioner.

This Petition presents an ideal opportunity for the Court to address the Second Circuit's concerns on this question as stated in *Gilchrist v. O'Keefe*, supra, at page 97, and the concerns expressed by the Third Circuit in *Fischetti v. Johnson*, 384 F.3d 140 (3rd Cir. 2004); *United States v. Goldberg*, 67 F.3d 1092 (3rd Cir. 1995); and *Wilkerson v. Klem*, 412 F.3d 449 (3rd Cir. 2005), that habeas petitioners who claim unconstitutional deprivation of their right to counsel under the Sixth and Fourteenth Amendments based upon state court determinations of their forfeiture of that right by their

conduct, presently have no basis for relief in federal habeas corpus.

Petitioner further prays that the Court make an examination of the record to independently determine whether Petitioner's First Amendment rights were violated when the court penalized Petitioner by revoking his Sixth Amendment right to counsel, and Fourteenth Amendment right to a fair trial as a result of having written the March 29, 2004 letter to Mr. Roden. *Feiner v. People of the State of New York*, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS A. ZARRO, JR.
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Petitioner Pro Se

November 2, 2010

Appendix A

SUPREME COURT OF THE
STATE OF NEW YORK

APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

____AD3d____
Argued: September 29, 2009

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL, JJ.

2004-07982

THE PEOPLE, ETC.,

Respondent,

—v.—

FRANCIS A. ZARRO, JR.,

Appellant.

(Ind. No. 23/03)
October 27, 2009

DECISION & ORDER

Carol Kahn, New York, N.Y., for appellant, and appellant pro se.

Andrew M. Cuomo, Attorney General, New York, N.Y. (Roseann B. MacKechnie and Jodi A. Danzig of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Dutchess County (Rooney, J.), rendered November 18, 2004, convicting him of scheme to defraud in the first degree, grand larceny in the first degree, grand larceny in the second degree (five counts), criminal possession of stolen property in the second degree (four counts), and grand larceny in the third degree (two counts), after a nonjury trial, and imposing sentence. The appeal brings up for review the denial, without a hearing, of that branch of the defendant's omnibus motion which was to suppress physical evidence.

ORDERED that the judgment is affirmed.

"The right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at the defendant's option" *(People v McClam*, 60 AD3d 968, 969; *cf. People v Linares*, 2 NY3d 507, 510). Rather, "before substitution of counsel is granted, good cause, such as a conflict of interest or irreconcilable differences, must be demonstrated" *(People v Martin*, 41 AD3d 616, 616). "Good cause determinations are necessarily case-specific and, therefore, fall within the discretion of the trial court" *(People v McClam*, 60 AD3d at 970). Here, the court did not improvi-

dently exercise its discretion in refusing, on the eve of trial, to grant substitution of the defendant's counsel. The record makes clear that the request, made on the day opening statements were scheduled to be delivered, was engineered by the defendant merely as a dilatory tactic *(see People v Arroyave,* 49 NY2d 264, 271-272; *People v Stevenson,* 36 AD3d 634; *People v Gloster,* 175 AD2d 258, 259).

Contrary to the defendant's contention, he validly waived his right to a jury trial *(see NY* Const Art 1, § 2). The court ensured that the defendant understood the rights he was giving up, and the defendant signed the waiver in open court after having those rights explained to him *(see People v Buckley,* 299 AD2d 417, 418; *People v Longchamp,* 147 AD2d 659). Nothing in the proceedings vitiated the validity of the waiver.

The defendant claims that the evidence was legally insufficient to establish his guilt of scheme to defraud in the first degree. To the extent that the claim is preserved for appellate review, it is without merit. Viewing the evidence in the light most favorable to the prosecution, we find that it was legally sufficient to establish the defendant's guilt of scheme to defraud in the first degree *(see* Penal Law § 190.65[1]) beyond a reasonable doubt *(see People v Contes,* 60 NY2d 620). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence *(see* CPL 470.15[5]; *People v Danielson,* 9 NY3d 342), we nevertheless accord great deference to the fact-finder's opportunity to view the witnesses, hear the testimony, and observe demeanor *(see People*

v Mateo, 2 NY3d 383, 410, *cert denied* 542 US 946; *People v Bleakley*, 69 NY2d 490, 495). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence *(see People v Romero*, 7 NY3d 633).

Contrary to the defendant's contention, the prosecution established by a preponderance of the evidence that venue was proper in Dutchess County *(see People v Greenberg*, 89 NY2d 553, 555-556).

The defendant's contention that the Attorney General had a conflict of interest is dehors the record, and the defendant's contention that he was deprived of his right to the effective assistance of counsel also rests largely on matter dehors the record. To the extent that those claims are dehors the record, they may not be reviewed on direct appeal *(see People v Fleming*, 65 AD3d 702). To the extent the record permits review of the defendant's claim that counsel was ineffective, we find that the defendant received effective representation *(see People v Jorge*, 61 AD3d 996, 996-997).

The defendant's claim regarding the Attorney General's authority to prosecute him is without merit *(see* Executive Law § 63[3]; *Matter of Mann Judd Landau v Hynes*, 49 NY2d 128, 138), as are the defendant's claims regarding the indictment *(see People v First Meridian Planning Corp.*, 86 NY2d 608, 616; *People v Kindlon*, 217 AD2d 793, 795; *People v Rosich*, 170 AD2d 703; *cf. People v Sanchez*, 84 NY2d 440), the search warrant *(People v Fernandez*, 61 AD3d 891), the grand jury proceedings *(see People v Hernandez*, 27 AD3d

229), and the court's deliberation and the form of its verdict *(see* CPL 320.20).

The sentence imposed was not excessive *(see People v Suitte,* 90 AD2d 80).

MASTRO, J.P., FISHER, ANGIOLILLO and LEVENTHAL, JJ., concur.

ENTER:

/s/ JAMES EDWARD PELZER
James Edward Pelzer
Clerk of the Court

Appendix B

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. EUGENE F. PIGOTT, JR.,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
—against—
FRANCIS A. ZARRO, JR.,
Appellant.

CERTIFICATE DENYING LEAVE

I, EUGENE F. PIGOTT, JR., Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law

* ***Description of Order***: Order of the Appellate Division, Second Judicial Department, entered October 27, 2009, affirming a judgment of County Court, Dutchess County, rendered November 18, 2004.

presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated: Buffalo, New York
this 5th day of May, 2010

/s/ EUGENE F. PIGOTT, JR.
Associate Judge

Appendix C

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. EUGENE F. PIGOTT, JR.,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
—against—
FRANCIS A. ZARRO, JR.,
Appellant.

CERTIFICATE DENYING APPLICATION FOR RECONSIDERATION

I, EUGENE F. PIGOTT, JR., Associate Judge of the Court of Appeals of the State of New York, do hereby certify that the application made by the above-named appellant for reconsideration of the May 5, 2010, certificate denying application for leave to appeal* pursuant to CPL 460.20 is hereby denied.

---

* ***Description of Order***: Order of the Appellate Division, Second Judicial Department, entered October 27, 2009, affirming a judgment of County Court, Dutchess County, rendered November 18, 2004.

Dated: Buffalo, New York
this 6th day of August, 2010

/s/ EUGENE F. PIGOTT, JR.
Associate Judge

No. 10-595

FILED
JAN 3 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FRANCIS A. ZARRO, JR.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioner respectfully requests that this Court grant rehearing of its order dated December 10, 2010, which denied certiorari, and that the Court now grant certiorari and reverse the judgment and remand for a hearing on subject matter jurisdiction and the unconstitutionality of New York Executive Law 63(3), the supercedure statute upon which the case at bar was prosecuted for vagueness.

The petition for certiorari previously filed herein presented the questions: (1) Does a criminal defendant involuntarily waive or forfeit his Sixth Amendment right to conflict free counsel on, the basis of writing a letter to his lawyer on the eve of trial which the trial court subsequently describes as expressing defendant's concerns that more time is needed to prepare for trial? (2) Does counsel's violation of the Advocate Witness Rule by unilaterally testifying as an unsworn witness against his client on a material issue in the case on the record of proceedings to the Judge in a bench trial, on the opening day of trial immediately prior to opening statements, where Defendant has not taken the stand or committed perjury, violate Defendant's Sixth Amendment right to effective assistance of counsel and further deprive Defendant of fair trial before an unbiased trier of fact? The petition for certiorari discussed the importance of the questions presented in this case and its impact upon the administration of justice especially concerning the issue of forfeiture of a criminal defendant's Sixth Amendment right to counsel, and the necessity for the Court to

define what "serious defendant misconduct" could give rise to such a forfeiture.

This motion is based upon substantial grounds not previously presented, to wit that the Court should enter an order based upon the uncontroverted record in the State Courts and that the trial court lacked subject matter jurisdiction and denied Petitioner's federal due process rights by deciding jurisdiction on an incomplete record without a hearing. *Frank v. Mangum,* 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); *Ex Parte Cuddy,* 131 U.S. 280, 9 S.Ct. 703, 33 L.Ed. 154 (1889); *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *Danforth v. Minnesota,* 128 S.Ct. 1029 (2008) and the unconstitutional New York Executive Law 63(3) upon which the trial court based subject manner jurisdiction.

ABSENCE OF SUBJECT MATTER JURISDICTION IN THE TRIAL COURT

Unless otherwise provided by statute, the New York Attorney General does not have authority to prosecute crimes in the State's Sixty-two Counties. By virtue of State Constitutional and Statutory authority this power rests solely with the duly elected District Attorneys who are elected to investigate and prosecute crimes which occur in the Counties which they represent. *People v. Gilmour,* 98 N.Y.2d 126, 746 N.Y.S.2d 114, 773 N.E.2d 479 (Ct. App. 2002); *Della Pietra v. State of New York,* 71 N.Y.2d 792, 530 N.Y.S.2d 510, 526 N.E.2d 1 (Ct. App. 1988); *People v. Romero,* 91 N.Y.2d 750, 675 N.Y.S.2d 588, 698 N.E.2d 424 (Ct.

App. 1998); *People v. Fox*, 253 A.D.2d 192, 692 N.Y.S.2d 174 (A.D. 3 Dept. 1999).

In October 2002, Petitioner moved to controvert the search warrants in this case by motion to suppress and specifically challenged the Attorney General's authority to obtain and execute the warrants [Appendix C]. The Attorney General responded by providing the trial court with a copy of a purported referral letter dated March 27, 2001 from Elizabeth McCaul, New York State Banking Department Superintendent at the time, pursuant to Executive Law § 63(3).

Petitioner's counsel Benedict Gullo characterized the letter as a "sham", stating that the Banking Department itself had no jurisdiction over Petitioner, and that the Banking Department had never received a complaint against or conducted an antecedent agency investigation of Petitioner which would lead to such a referral letter as required by state statute. The motion was denied without a hearing. Petitioner addressed the same grounds in a branch of an April 2003 omnibus motion, also denied without a hearing on January 5, 2004.

Petitioner challenged the Attorney General's authority again in a December 2005 post-conviction motion, during the course of which the Attorney General admitted to issuing pre-March 27, 2001 (January 1999) subpoenas in the case relating to the indictment, but then attempted to justify the 1999 subpoenas by changing its basis of authority from the March 27, 2001 referral letter to an unrelated December 30, 1997 referral letter concerning a William Zuga, who had nothing to do with Petitioner, and who Petitioner does not

know, and has had no dealings with. The Attorney General told the trial court in a March 23, 2006 letter in the CPL § 440 proceeding, that although the December 30, 1997 letter did not name Petitioner, it was based on a "joint" Banking Department complaint against and investigation of Petitioner and a person named William Zuga.

Petitioner's counsel demanded to see the joint complaint, but the Attorney General refused, and on December 31, 2006, the trial court denied the CPL § 440 motion without a hearing.

Petitioner thereafter sought and obtained through State FOIL and the use of private investigators, evidence in the form of official state documents, and attorney and licensed private investigator affidavits evidencing that the New York Attorney General did not have authority to investigate and prosecute Petitioner and that the Trial Court thusly never obtained subject matter jurisdiction.

On December 12, 2008, Petitioner applied for subpoenas in the criminal case for present and former Banking Department officials and records. The Attorney General opposed and the application was denied.

On December 9, 2008; May 18, 2009 and October 2, 2009, the New York State Banking Department certified to Petitioner that it never received a complaint against or conducted an investigation of Petitioner, and that the New York State Banking Department has no official record of any complaint against or investigation of Petitioner, or Executive Law 63(3) referral letter concerning Petitioner, or record or log of any such record being destroyed or disposed of, disclosable or non-disclosable.

On November 13, 2008, the New York Attorney General disclosed that the December 30, 1997, so-called "Zuga" referral which it had represented was a further source of authority to investigate Petitioner, was not based upon a joint Banking Department complaint and investigation of Petitioner and Zuga, but, only Zuga.

On July 24, 2008, the New York State Police disclosed that the Attorney General began its investigation of Petitioner on June 10, 1997, before any purported referral letter came into existence.

The New York State Archives, the only official State facility designated for the maintenance of Banking Department records of complaints, investigations and Executive Law § 63(3) referral letters, such as concern this Petition, has no record of any Banking Department complaint, investigation or referral letter concerning Petitioner.

Former New York State Banking Department Superintendent Elizabeth McCaul stated to investigators that she could not verify the signature on the March 27, 2001 letter as her own; did not recall Petitioner's case; and would not authenticate the March 27, 2001 letter and continues to refuse to say if the signature on the letter is her own.

Petitioner's private investigator stated after a preliminary comparative analysis that the signature on the March 27, 2001 letter does not appear to be Ms. McCaul's, and the Attorney General did not at any time produce an affidavit from Ms. McCaul that she signed the March 27, 2001 letter and continues to refuse to produce such an affidavit.

The CPL § 440 court denied the motion on October 27, 2009, but, granted limited hearing on suppression of pre-referral evidence, which it subsequently cancelled on cross motion by the Attorney General. The Appellate Division, Second Judicial Department, denied each of Petitioner's motions for certificate of leave to appeal the trial court's denial of the CPL § 440 motions. The Appellate Division Second Department denied Petitioner's motion to enlarge the record on appeal to include these documents on the original record on direct appeal, and denied inter alia, the jurisdiction claims branch of Petitioner's direct appeal on the same day October 27, 2009, when it affirmed Petitioner's conviction. The New York Court of Appeals denied leave on May 5, 2010 *People v. Zarro,* 14 N.Y.3d 894. A motion to re-argue was filed on May 24, 2010, and supplemental filing on June 14, 2010, and was denied again on August 6, 2010 *People v. Zarro,* 15 N.Y.3d 811.

Petitioner was deprived of his Fourteenth Amendment right to be tried by a court of competent jurisdiction, and the trial court on pretrial suppression and omnibus motions and post-conviction motions without a hearing; and the Appellate Division, Second Judicial Department, in its October 27, 2009 affirmance, and the New York Court of Appeals, in its May 5, 2010 and August 6, 2010 denials of leave to appeal, based their decisions that the Attorney General had jurisdiction and authority in this case on an incomplete record on appeal, and refused to conduct any hearings, and thereby denied Petitioner his right to due process of law as decided by the Supreme Court of the United States in *Ex parte Cuddy,* 131 U.S. 280,

9 S.Ct. 703, 33 L.Ed. 154 (1889); *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Danforth v. Minnesota*, supra, existing at time of Petitioner's case, concerning the violation of Petitioner's Fourteenth Amendment right to be tried by a court of competent jurisdiction and to a hearing to fully and fairly litigate whether or not the court had subject matter jurisdiction. This is a federal due process question not a mere interpretation of a New York supercedure statute. The State courts have refused to evaluate and test evidence at a hearing, proving that the provisions of Executive Law § 63(3) were not complied with thereby depriving the trial court of subject matter jurisdiction. A hearing on this petition was essential to establish this evidence on the record.

Under New York Law, the burden of proof is on the Attorney General to establish jurisdiction on the basis of Executive Law § 63(3) *People v. Gilmour*, supra.

The presumption is that a court of general jurisdiction proceeded to judgment only after duly acquiring jurisdiction both of the subject matter and the parties, and that it acted in accordance with the rules of practice governing it, and did not act until every prerequisite required by the law had been complied with *Williams v. State of North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Steinhardt v. Baker*, 163 N.Y. 410, 57 N.E. 629 (N.Y. June 12, 1900); *Smith v. Central Trust Co.*, 154 N.Y. 333, 48 N.E. 553 (N.Y. Nov. 23, 1897).

This presumption is not allowed to contradict the record and can arise only with respect to jurisdictional facts concerning which the record discloses nothing and concerning which no evidence is offered *Ex parte Cuddy*, supra, *Frank v. Mangum*, supra.

"When it affirmatively appears that any essential step was omitted, the Presumption in favor of jurisdiction is destroyed. It should be noted that no such presumption exists with respect to inferior courts of limited jurisdiction. *Smith v. Central Trust*, supra, Cf *People v. Pugliese*, 80 Misc. 75, 140 N.Y.S. 849 (N.Y.Sup. Mar. 26, 1913), *affd* 164 A.D. 900, 148 N.Y.S. 1135 (N.Y.A.D. 2 Dept., July 31, 1914). See also Federal Rule of Civil Procedure 8(a)(1) which requires that pleadings allege the basis for jurisdiction".

The language of New York Executive Law § 63(3) is unconstitutionally vague as to whether or not the Attorney General of New York may trigger his own latent criminal prosecutorial powers by soliciting or self referring his own Executive Law § 63(3) referral letter. Not only is the statute unconstitutionally vague, but the leading New York Court of Appeals cases are silent in this point even though the legislative history of the statute clearly and logically indicates that the latent prosecutorial powers of the New York Attorney General may only be invoked by the head of a department of State Government on the basis of an antecedent departmental investigation of a subject on matters related, to the department's statutory purpose. At bar, New York Attorney General has admitted on the record that he solicits these letters as a matter of practice.

An examination by the Supreme Court of New York Executive Law § 63(3) for unconstitutional vagueness is not only of critical importance for disposition of this Petition, but, has significant national importance as well.

New York is the Nation's financial hub and the New York Attorney General has of late sought to expand its regulatory and procedural roles in addressing financial regulatory activities around the Nation and the world *Cuomo v. Clearing House Association L.L.C.*, ___ U.S. ___, 129 S.Ct. 2710, 174 L.Ed.2d 464 (2009).

The Office of the New York Attorney General is unique as state prosecutors go in that he has been divested by state statute and state constitutional provisions of all non-securities criminal prosecutorial functions, save for those specifically granted by his strict compliance with Executive Law § 63. *People v. Gilmour*, 98 N.Y.2d 126, 746 N.Y.S.2d 114, 773 N.E.2d 479 (Ct. App. 2002).

Failing strict compliance, the New York Attorney General is "not a prosecutor at all". *Della Pietra v. State of New York*, 71 N.Y.2d 792, 530 N.Y.S.2d 510, 526 N.E.2d 1 (Ct. App. 1988).

The New York State Constitution and New York State Legislature have attempted ot circumscribe the Attorney General's powers, and yet, Executive Law § 63(3) is vague enough to have allowed the New York Attorney General to assume penultimate prosecutorial authority over financial matters without interference by the state courts. This is especially troublesome in the current economic environment where small businesses and entrepreneurs, such as Petitioner who are the

least able to contend with the vast resources of the state, are left vulnerable to selective punitive and politically motivated prosecutions.

On the issue of self created referrals or solicited referrals, Executive Law § 63(3) and the New York courts are vague, and the New York Attorney General has filled the vacuum and overstepped his jurisdictional bounds in this case and others. In *People v. Codina*, 297 A.D.2d 539, 541, 747 N.Y.S.2d 209, 211 (A.D. 1 Dept. 2002), the Appellate Division, First Judicial Department specifically held "we reject self referrals" and yet, at bar, the Attorney General has admitted on the record "we solicit referrals all the time" and has tried to say that a "solicited" referral is different from a "self created referral".

The New York Court of Appeals has never issued a ruling on whether or not "self created" or "solicited" referrals could properly invoke the Attorney General's latent prosecutorial powers.

The New York courts have never fully and fairly litigated the Executive Law § 63(3) issue in this case, and have refused to conduct a single hearing in the face of Banking Department certifications and affidavits from private investigators, decisively rebutting any presumption that the purported March 27, 2001 referral letter was authentic, and conclusively establishing that the Banking Department has no official record of having ever received a complaint against; conducted and investigation of or issued a valid Executive Law § 63(3) referral letter pertaining to Petitioner.

In a recent appeal concerning Petitioner's Second amended complaint in a 42 U.S.C. § 1983 action, issued and served with the prior approval and by order of the District Court in response to the mandate of the United States Court of Appeals for the Second Circuit, in *Zarro v. Spitzer,* 274 Fed. Appx. 31, 35 [5] (2nd Cir. 2008), the Circuit authorized Petitioner to proceed with his 42 U.S.C. § 1983 malicious Prosecution and Abuse of Process claims against State actors and non-State actors, and in specific Appellant's claims that he was arrested and prosecuted by the State actors without proper statutory authority or jurisdiction. Petitioner did not include the jurisdiction grounds in the initial Petition to the Supreme Court because a decision on the appeal pending in the Second Circuit, and a parallel motion to certify state law question to the New York Court of Appeals was pending at the time Petitioner transmitted the Petition to the printer for filing. The Second Circuit affirmed the dismissal of the action by the United States District Court for the Northern District of New York, on immunity and jurisdiction grounds on October 18, 2010, holding that prior state court decisions were preclusive on jurisdiction and thusly, immunity. *Francis A. Zarro, Jr. v. Eliot Spitzer, et al.,* 09-4349-CV (2nd Cir. 2010). The Second Circuit's October 18, 2010 decision is the "intervening factor" which gives rise to the instant Petition.

Petitioner moved the Second Circuit to certify the Executive Law § 63(3) issues concerning authority and jurisdiction, to the New York Court of Appeals, as part of Petitioner's appeal to the Second Circuit, in the 42 U.S.C. § 1983 action. The

motion was denied. The certification questions presented were not only appropriate but essential to deciding the appeal, which was based primarily on defenses of prosecutorial immunity, which defense would be defeated upon a showing of absence of jurisdiction and authority. The New York courts have avoided these questions because they very likely expose long standing prosecutorial practices by the Attorney General of New York which are ultra vires.

As to the due process of law that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state must be before a court of competent jurisdiction. The Supreme Court may vacate a state court criminal conviction either because [as at bar], such jurisdiction was absent at the beginning or because it was lost in the course of proceedings *Frank v. Mangum,* supra; *Ex parte Cuddy*, supra; *Lonchar v. Thomas,* 517 U.S. 314, 322, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996); *Danforth v. Minnesota,* supra.

Petitioner respectfully requests that the Supreme Court review the application and constitutionality of New York Executive Law 63(3); reverse the judgment and remand the case to the state courts for a full and fair hearing on violations of Petitioner's Fourteenth Amendment due process right to be tried by a court of competent jurisdiction, based upon this unconstitutionally vague supercedure statute, and the ultra vires actions of the New York Attorney General in this case.

The undisputed record in this case, annexed; this Court's prior decisions on the right of a crim-

inal defendant and the vagueness of NY Executive Law 63(3) merit that certiorari be granted and that reversal of the judgment of conviction be ordered.

Respectfully submitted,

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CERTIFICATE

I certify that this petition is presented in good faith and not for purposes of delay.

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CERTIFICATION PURSUANT TO RULE 29.4(c)

Petitioner certifies and provides notification as required by Rule 29.4(c), to the Attorney General of New York, pursuant to 28 U.S.C. § 2403(b), that Petitioner is challenging the constitutionality of a New York State Statute, to wit; New York Executive Law § 63(3).

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